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Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Marshall Islands

1. Introduction: Overview of the legal and institutional framework of the Marshall Islands in the context of implementation of the United Nations Convention against Corruption

The Government of the Marshall Islands acceded to the Convention on 17 November 2011. Pursuant to section 1(3)(d), article V of the Constitution, the Nitijela (Parliament) approved the accession of the Marshall Islands. The Convention entered into force on 17 December 2011.

The Marshall Islands was placed under the administration of the United States of America after the Second World War as one of the United Nations Trust Territories, but gained independence in 1983 and achieved full sovereignty in 1986, under the Compact of Free Association with the United States of America. Its governing system is therefore much influenced by and modelled after the American and its legal system. It also follows the monist approach making international treaties and conventions the law of the land after ratification. English is the country's main official language.

The Constitution, adopted in 1979, is the supreme law of the Marshall Islands, and any inconsistent law will, to the extent of the inconsistency, be void. The Government of the Marshall Islands operates under a mixed parliamentary-presidential system. Elections are held every four years in universal suffrage, with each of the 44 constituencies electing representatives to the lower house of the bicameral legislature of the Marshall Islands, the Nitijela. The legislative authority is vested in the Nitijela, pursuant to article VI of the Constitution. The upper house, the Council of Iroij, is an advisory body comprising of 12 tribal chiefs. The executive branch consists of the President, elected by the Nitijela, and his/her Presidential Cabinet of 10 Ministers. The judicial power of the Marshall Islands is vested in the Supreme Court, High Court, Traditional Rights Court and such District, Community or other courts, as created by law. These courts are independent of the legislative and executive powers (art. VI, Constitution; s. 203, Judiciary Act).

Key authorities in regard to the fight against corruption are the Attorney General's Office, National Police, Auditor-General's Office, Public Service Commission, Government Ethics Board and the Domestic Financial Intelligence Unit (DFIU).

2. Chapter III: Criminalization and law enforcement

Regarding statistics of corruption cases investigated, prosecuted and adjudicated, it was confirmed during the country visit that there have only been a very limited number of cases in the last few years. The absence of case examples affects the analysis of the implementation of the chapter by the Marshall Islands, insofar as it was not possible to reach a determination of the effective implementation of the legislative framework in practice.

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Active and passive bribery of public officials is criminalized in section 240.1 of the Criminal Code (CC). "Public servant" is the term used in the law, which is comprehensively defined, in accordance with article 2 (s. 240.0(7)) of the United Nations Convention against Corruption. Passive bribery is further criminalized in section 1704 of the Ethics in Government Act. There have been no completed prosecutions arising from allegations of bribery.

Only active bribery of foreign public officials is addressed in section 240.1(3) of CC.

The Marshall Islands relies on the general bribery provisions to pursue cases of trading in influence. Supposed influence is covered by section 240.1(2)(e) of CC and through the impersonating of a public servant (s. 241.9, CC).

Active and passive bribery in the private sector is partially covered by section 224.9 of CC; however, the scope of perpetrators (i.e. trustee, lawyer) is limited and the offence is classified as a misdemeanour.

Money-laundering, concealment (arts. 23 and 24)

The offence of money-laundering is provided for in the Banking Act. Section 166 contains the objective and subjective elements of the money-laundering offence as required under the Convention. However, it only penalizes a person who "renders assistance" to the conversion or transfer of property and to concealing or disguising the true nature, origin, location, disposition, movement or ownership of such property. The Marshall Islands has adopted measures that broadly cover the participatory acts outlined in article 23(1)(b)(ii) (ss. 2.06, 5.01 and 5.03, CC; s. 166(1)(b) and (3), Banking Act). The Banking Act uses a "serious offence" threshold approach for predicate offences where "maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months" (s. 102(dd)), which includes most offences under the Convention against Corruption. There has been one successful prosecution of a money-laundering case in the Marshall Islands in 2003.

Concealment is criminalized in CC, more generally under section 241.7, but also for specific acts, such as the concealment of recordable instruments (s. 224.4).

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Embezzlement is addressed in section 240.7 of CC and section 1704(9) of the Ethics in Government Act. Property is also broadly defined to include "anything of value". In relation to private sector embezzlement, section 224.14 of CC only covers "property that has been entrusted to such person as a fiduciary" and the penalty is a misdemeanour.

Abuse of functions is criminalized in section 240.6 of CC, whereby a public servant (as defined in section 240.0(7) of CC) who (1) "knowingly does an unlawful act under the color of office" will be guilty of a felony of the second degree or (2) "recklessly neglects to perform the duties of the office as provided by law" is guilty of a felony of the third degree.

Section 240.8 of CC specifically criminalizes illicit enrichment.

Obstruction of justice (art. 25)

Obstruction of justice is criminalized principally in sections 240.2, 241.6, 241.7, 242.2 and 242.3 of CC. In particular, section 241.6 (tampering with witnesses and informants) appears to cover the bribery of witnesses and informants and also extends to specified means (use of physical force, threats or intimidation), while section 242.2 could conceivably extend to interference with law enforcement officials. Section 240.2 (influencing official matters by threat) is the general provision that could be applied. There have been no cases of obstruction of justice.

Liability of legal persons (art. 26)

Section 1.13(8) of CC defines "persons" as both natural and legal persons. The liability of a legal person can be civil, criminal or administrative, as provided for in the Business Corporations Act, Revised Partnership Act, Limited Partnership Act and Limited Liability Company Act, which are collectively known as the Associations Law. There have been no examples of implementation, either investigations or proceedings.

Participation and attempt (art. 27)

The participation in offences is criminalized in the Marshall Islands (ss. 2.06, 5.02 and 5.03, CC). "Criminal attempt" is covered in section 5.01 of CC. There have been no related investigations or prosecutions. Preparation is criminalized in section 2.06(3)(a)(ii) of CC.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

The determination of sanctions is covered in section 1.04 of CC.

Public officials enjoy functional immunity. However, according to article IV, section 16 of the Constitution, Nitijela Members enjoy functional immunity from civil or criminal proceedings for conduct concerning Nitijela matters. Furthermore, "Members of the Nitijela shall, except in cases of felony, be privileged from arrest during any session of the Nitijela, and in going to or returning from the same" (art. IV, s.16(2), Constitution).

The Marshall Islands follows a system of discretionary prosecution. The Attorney General, pursuant to section 3, article VII of the Constitution, has broad discretion to prosecute. There are several legal safeguards in place that require him or her to exercise this discretion judiciously, in the public interest and based on the sufficiency of evidence. Prosecution decisions are also subject to judicial review, although there have been no such cases.

Conditions on release pending trial are designed to ensure the presence of the defendant at the criminal proceedings (r.46, Rules of Criminal Procedure).

The Marshall Islands has a Parole Board whose functions are outlined in section 306 of the Parole of Prisoners Act. The Board makes recommendations on parole to the Cabinet. There have never been persons released on parole in corruption-related matters, as such a request has never come before the Board.

The suspension of a Government employee who has been charged with an offence is covered by rule 71 of the Public Service Regulations. However, even where an employee has been accused of an offence, his/her immediate supervisor or the Public Service Commission may determine matters of suspension. There is an appeal process, whereby the Appeal Board's recommendation is given to the Public Service Commissioner who makes the ultimate decision. The termination of Government employees is covered in section 6.07 (termination of public employment for felony conviction) of CC, while the "suspension with or without pay for specific periods of time" may be imposed by the Government Ethics Board (s. 1706(2)(b) of the Ethics in Government Act). Thus, the disqualification of a convicted person from holding public office is covered. Further civil and administrative remedies against public officials are covered in section 1706 of the Ethics in Government Act. The Government Ethics Board "may [also] make regulations ... to specify additional ethical restrictions and requirements for public officials" (s. 1707).

The Marshall Islands used to have a prisoner rehabilitation programme, which ceased to exist in 2013. There are currently no prison facilities to house female inmates.

The Marshall Islands has established measures to encourage defendants and persons who participated in the commission of offences to cooperate in investigations and prosecutions, and to provide testimony or evidence in line with article 37 of the Convention against Corruption. The Attorney General's Office has a wide discretion and engages in plea-bargaining.

Protection of witnesses and reporting persons (arts. 32 and 33)

The Marshall Islands has not adopted measures to protect witnesses or experts, with the exception of permitting an initial appearance in preliminary proceedings by video conference (r. 5, Rules of Criminal Procedure). In relation to reporting persons, section 914 of the Auditor-General Act protects informers in relation to their identity when they provide the Auditor-General with information.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

The Proceeds of Crime Act (POCA) and Banking Act provide for conviction-based confiscation and provisional measures for purposes of confiscation. Under section 222 of POCA, the High Court may, on the application of the Attorney General, make a confiscation order against tainted property in relation to a person's conviction of a serious offence. In relation to money-laundering offences, the relevant provision is section 174 of the Banking Act, and either the Commissioner or the Attorney General can make the application. "Serious offence" is defined in this context to include any offence in or outside the Marshall Islands, which is punishable by imprisonment for not less than 12 months (s. 102, Banking Act). "Tainted property" under POCA may be inferred under certain circumstances to be property used in, or in connection with, the commission of a serious offence or "proceeds of crime" (s. 205(1)(p)). The authorities confirmed that tainted property includes instrumentalities used and destined for use in the commission of a serious offence. Under the Banking Act, "tainted property" means any property obtained in whole or in part from the proceeds of a criminal offence or from the proceeds of money-laundering (s. 102(ff)). "Proceeds of crime" is defined under section 102 of

the Banking Act as any property derived from or obtained, directly or indirectly through the commission of a serious offence; in POCA, this is defined as "fruits of a crime, or any property derived or realized directly or indirectly from a serious offense and includes, on a proportional basis, property into which any property derived or realized directly from the offense was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the offense" (s. 205(1)(k)). In general, there were a number of inconsistencies noted between POCA and the Banking Act.

The police officer who seizes property is the administrator of that property (s. 255, POCA).

Sections 251, 252, 254, 258 and 261-265 of POCA provide for production or monitoring orders against property under certain conditions to prevent the dealing or disposal of the property, as well as search and seizure of suspected tainted or other property under a search warrant, or without in emergencies. The procedure needed to obtain a court-issued warrant for investigating authorities to access government and financial or commercial records was deemed straightforward in practice.

Section 217(1)(b) of POCA provides that "the defendant and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application and (c) the High Court may ... direct the Attorney-General to: (i) give notice of the application to any person who, in the opinion of the High Court, appears to have an interest in the property".

The rights of bona fide third parties are covered in section 225 of POCA.

There have been no related cases of confiscation, freezing or seizure.

Section 154(1)(d) of the Banking Act provides for bank secrecy to be lifted by a judicial order.

Statute of limitations; criminal record (arts. 29 and 41)

The period of limitations for offences is outlined in section 1.06 of CC. For most corruption offences, including felonies and misdemeanours, the limit is six years, while for "petty misdemeanours" it is one year. The limitation commences from the date of the commission of the offence. The period of limitation can be tolled when: (a) the accused is continuously absent from the Marshall Islands or has no reasonably ascertainable place or abode or work within the Marshall Islands, but in no case shall the limitation period be extended by more than three years from the expiration of the prescribed period, or (b) a prosecution against the accused for the same conduct is pending in the Marshall Islands (s.1.06(6), CC).

Previous convictions, including foreign convictions, can be taken into account during sentencing by the courts.

Jurisdiction (art. 42)

Jurisdiction over offences committed on board vessels and aircraft appears to be regulated as an extension of the territorial jurisdiction of the Marshall Islands and is addressed for money-laundering offences. The Marshall Islands has not adopted the

active and passive personality principles or the State protection principle in its domestic law.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

The Marshall Islands has only adopted a few measures to address consequences of corruption. Under the Associations Law, the Registrar of Corporations can deregister a company. Under the Procurement Code, the Bidding Committee can reconsider procurement grants where there are acts of corruption.

Compensation for entities or persons who have suffered damage as a result of an act of corruption is addressed in sections 215 of POCA and 185 of CC.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The key anti-corruption authorities include the Attorney General's Office, National Police, Office of the Auditor General and DFIU. There is also the Public Service Commission and Government Ethics Board. To date, of the limited number of corruption cases, most have involved public funds that the Auditor General's Office has investigated. DFIU has an administrative role and is located within the Banking Commission; it currently does not have a dedicated staff member.

Arrangements, both formal and informal, are in place for cooperation among the authorities. There are memoranda of understanding between the compliance authorities and between the National Police and Auditor General's Office, with also another pending between the Police and Customs Authority. A formal arrangement focuses on money-laundering (Anti-Money Laundering Taskforce). Otherwise, informal cooperation is commonly used.

While there is no comprehensive programme of interaction or outreach to the private sector, basic informal arrangements facilitate cooperation between the national authorities and the private sector. There is no specific duty to report corruption by public officials. However, the Auditor-General's Office encourages persons to report acts of corruption through its hotline and website.

2.2. Successes and good practices

Overall, the following success and good practice in implementing Chapter III of the Convention is highlighted:

- Proactive sharing of information between national law enforcement authorities in accordance with article 38 of the Convention.

2.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Consider adopting legislation to criminalize the passive form of both bribery of foreign public officials and trading in influence (Convention art. 16, para. 2, art. 18, para. b).
- Consider adopting legislation to broaden the scope of the law in relation to: (a) criminalizing bribery in the private sector, extending it to any person who directs or works for a private sector entity (art. 21); and (b) embezzlement in the private sector in order to cover all private sector bodies (art. 22).

- Amend the money-laundering provisions to comply with article 23, in particular subparagraph (1)(a), of the Convention.
- Furnish copies of the law in relation to money-laundering to the Secretary-General of the United Nations (art. 23(2)(d)).
- Set forth in legislation effective, proportionate and dissuasive sanctions against persons, including legal persons, for the commission of Convention offences (art. 26), including increasing the existing penalty of "misdemeanour" for bribery in the private sector (art. 21).
- Consider establishing a longer statute of limitations period in which to commence proceedings for offences under the Convention (art. 29).
- Ensure that sanctions take into account the gravity of that offence and provide the necessary facilities for also women to serve their prison sentences in accordance with international human rights standards (art. 30, para. 1).
- Consider adopting legislation or procedures to disqualify, for a period of time, a person convicted of a Convention offence from holding office in a State-owned enterprise (art. 30, para. 7).
- Endeavour to promote the reintegration into society of persons convicted of offences under the Convention (art. 30, para. 10).
- Consolidate POCA and the Banking Act in relation to freezing, seizure and confiscation in accordance with Convention article 31, ensuring that they apply to all corruption offences.
- Take measures to enable the freezing of an item, including a bank account, by competent authorities for the purpose of eventual confiscation (art. 31, para. 2).
- Adopt legislation or other appropriate measures to provide effective protection for witnesses, victims and experts, in accordance with article 32 of the Convention.
- Consider adopting appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds instances of corruption, in accordance with article 33 of the Convention.
- Take measures to address the consequences of corruption, especially with regard to contracts and concessions (art. 34).
- Ensure that persons or bodies specialized in combating corruption are vested with the necessary independence to carry out their functions effectively and without any undue influence, such as the DFIU (art. 36).
- May consider seeking to enter into agreements or arrangements with other States parties to facilitate assistance of cooperating offenders under article 37(5) of the Convention.
- Consider adopting such measures as may be necessary to establish jurisdiction in relation to the active and passive personality and State protection principles (art. 42, para. 2).

2.4. Technical assistance needs identified to improve implementation of the Convention

The following technical assistance needs were identified:

- Legislative drafting/legal advice with regard to articles 15, 16, 19, 21, 22, 23, 26, 27, 30, 31, 32, 33, 36, 37, 41 and 42.
- Good practices/lessons learned with regard to articles 16, 19, 21, 22, 26, 27, 29, 30, 31, 32, 33, 34, 36, 37, 39, 41 and 42.
- Capacity-building assistance to national authorities with regard to articles 17, 23 and 31.
- On-site assistance by an anti-corruption expert (articles 19 and 23).
- Development of an action plan for implementation (article 19).
- Training for investigators and prosecutors (articles 15, 16 and 17), public awareness-raising/anti-corruption educational programmes, capacity development (articles 17 and 23) particularly in establishing a DFIU position and perhaps a training and attachment to the Fiji FIU, development of a case management system with the necessary training, and an inter-agency coordination mechanism to fighting corruption in the Marshall Islands.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

The procedures regulating extradition to and from the Marshall Islands are contained in the Criminal Extradition Act (CEA). The Marshall Islands makes extradition conditional on the existence of a treaty. The legislation does not impose the requirement of dual criminality in order for an extradition request to be granted. Extradition is permitted where the respective offence in the Marshall Islands is classified as a "felony". The Marshall Islands only has two bilateral treaties currently in place, one with the United States and one with Taiwan Province of China.

A lack of extradition treaties with other States has led to an inability to provide assistance when requested by a number of States including Nauru and Papua New Guinea. The Marshall Islands has not used the Convention as a legal basis for extradition in respect of any Convention-related offences but noted that it would seek to introduce relevant amendments to domestic law in order to facilitate the use of the Convention for these purposes.

The reviewers noted that the limitation on the provision of extradition to felony offences meant that extradition could not be provided in relation to, for example, bribery in the private sector.

The Marshall Islands does not extradite an individual where it believes that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions.

The Marshall Islands is able to extradite its own nationals under its bilateral treaty with the United States and has done so in the past. However, where possible, domestic prosecution would be attempted first.

In the Marshall Islands, extradition proceedings are conducted in the same manner as criminal proceedings. The general guarantees of fair treatment are contained in section 212 of CEA and as provided for in the Constitution.

The legislation does not contain provisions requiring consultations to take place with requesting States before refusing extradition; however, in practice, such consultations have been conducted. The Marshall Islands is able to take the person sought into custody prior to the extradition hearing if it is considered necessary for the purposes of facilitating the request (s. 214, CEA).

The Marshall Islands does not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters and has granted extradition in relation to tax fraud cases. The authority responsible for extradition and mutual legal assistance (MLA) in the Marshall Islands is the Attorney General.

The bilateral treaty between the Marshall Islands and the United States provides for the transfer of sentenced persons.

Moreover, measures have not been put in place to facilitate the transfer of criminal proceedings to another jurisdiction.

Mutual legal assistance (art. 46)

The procedures regulating MLA are contained in the Mutual Assistance in Criminal Matters Act (MACMA) and CC. The purpose of MACMA is set out in section 403, namely "[t]his Act applies to the Marshall Islands and to any foreign State which may request assistance in criminal matters on a reciprocal basis". In practice, the Marshall Islands seeks to take a flexible approach to the provision of MLA.

MLA confirmed that where consideration is being given to refusing a request, national officials would first consult with the requesting State to consider whether assistance may be granted subject to certain terms and conditions. Where a request for assistance is refused, the Marshall Islands will provide reasons for such a refusal.

The Marshall Islands applies a dual criminality requirement to the provision of MLA, but a flexible conduct-based test is used (ss. 404 and 409, MACMA). However, assistance may be provided in the absence of dual criminality where only non-coercive measures are required to satisfy the request. Furthermore, the Marshall Islands is also flexible in providing informal assistance to other States in the absence of dual criminality. For example, the Transnational Crime Unit (TCU) of the Marshall Islands Police Force spontaneously transfers information to other Pacific TCUs through the Pacific Transnational Crime Network.

The Marshall Islands is able to provide MLA forms as outlined in article 46(3) of the Convention against Corruption, including the execution of search warrants and freezing orders where a court order is obtained. While there is no legal basis for the proactive transmission of information by law enforcement officials from the Marshall Islands, this is conducted in practice on a regular basis.

The Marshall Islands also confirmed that it is able to facilitate the transfer of detained persons for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to Convention offences. The Marshall Islands permits the use of videoconference for hearing a witness where conferencing services are available.

MLA requests are not refused on the grounds of bank secrecy, and effective cooperation has been established between law enforcement authorities, the Banking Commissioner and domestic banks in this regard. Section 408 of MACMA ensures that MLA requests made to the Marshall Islands are required to contain the categories of information covered in Convention article 46(15).

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Law enforcement is part of a large number of regional and international cooperation networks, such as the Pacific Transnational Crime Network. Furthermore, cooperation is carried out through bilateral agreements and arrangements, as well as on an ad hoc basis.

The Marshall Islands noted that it had conducted successful joint investigations and prosecutions in the past with the assistance of and cooperation with the Office of the Inspector General of the United States Department of the Interior with respect to fraud offences.

Under the Public Safety Act and CC, law enforcement authorities are authorized to use undercover surveillance. While equipment is available for electronic surveillance including auditor recording, national officials indicated that insufficient training had been provided to facilitate its effective use.

3.2. Successes and good practices

Overall, the following success and good practice in implementing Chapter IV of the Convention is highlighted:

- International law enforcement cooperation by the Marshall Islands, particularly in the region, is commendable (art. 48).

3.3. Challenges in implementation

The following challenges and recommendations were highlighted by the reviewers:

- Consider granting extradition requests that include several separate offences, one of which is extraditable (art. 44, para. 3).
- Ensure that any extradition treaties that the Marshall Islands may conclude with other Member States contain references to Convention offences as being extraditable (art. 44, para. 4).
- Consider adopting additional extradition and MLA agreements in order to allow for extradition with a broader range of States (art. 44, para. 18; art. 46, para. 30).

- Put in place the relevant domestic legislative measures and raise awareness among relevant public officials in order to facilitate the use of the Convention as a legal basis for extradition (art. 44, para. 5).
- Take measures to expedite extradition procedures and consider simplifying the evidentiary requirements for extradition requests in relation to Convention offences (art. 44, para. 9).
- May consider entering into additional agreements or arrangements on the transfer of sentenced persons (art. 45).
- Introduce measures to improve transparency, channels of communication and information sharing between the various authorities in the Marshall Islands so as to allow for more effective responses to MLA requests from other States, as required under the Convention (art. 46, para. 1).
- Notify the Secretary-General of the United Nations of the central authority designated for MLA, as well as the acceptable language for executing MLA requests (art. 46, paras. 13-14).
- Consider the possibility of transferring criminal proceedings to and from a foreign State where it would be in the interests of the proper administration of justice, in particular where several jurisdictions are involved (art. 47).
- Consider taking additional measures to allow for the effective use of special investigative techniques such as surveillance, undercover operations and, where appropriate, electronic surveillance operations, and providing the corresponding training to law enforcement personnel, including for the use of such techniques for international cooperation (art. 50).

3.4. Technical assistance needs identified to improve implementation of the Convention

The following technical assistance needs were identified:

- Training to law enforcement officials, prosecutors and the judiciary on the use of the Convention as a treaty basis for extradition.
- Legal advice with regard to articles 46 and 47.
- Good practices/lessons learned with regard to articles 46, 47, 49 and 50.
- Capacity-building programmes for authorities in relation to international cooperation in criminal matters, for cross-border law enforcement cooperation and for designing and managing the use of special investigative techniques.
- Technological assistance (i.e. establishment and management of databases/information-sharing systems).